A

Ezreen Nasuha bt Razuli v Public Prosecutor

B

HIGH COURT (SIBU) — CRIMINAL APPEAL NO SBW-41S-4–12 OF 2023
WONG SIONG TUNG J
21 OCTOBER 2024

C

Criminal Procedure — Charge — Defective charge — Accused was fined after pleading guilty to possessing certain amount of monies in her bank account which she could not satisfactorily account for — Whether charge on which accused was convicted was not an offence under s 37(1) of Sarawak's Minor Offences Ordinance 1958 ('MOO') — Whether 'possession' under MOO referred only to possession of tangible things and not monies in bank account which were 'choses in action' — Whether appellant's conviction and sentence could not stand — Whether appellant was not prejudiced, nor was miscarriage of justice occasioned, when magistrate told her that conviction on charge would carry mandatory punishment of fine and jail term — Whether accused could have retracted guilty plea if she feared imposition of jail sentence but she never did so

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The appellant was fined RM500 in default seven days' jail by the magistrate's court after she pleaded guilty to possession of an 'unlawfully obtained' sum of RM1,200 in her bank account, the acquisition of which sum she could not satisfactorily account for. The charge against the appellant was made pursuant to s 37(1) of the Sarawak's Minor Offences Ordinance 1958 ('the MOO'). In her instant appeal against the conviction and sentence, the appellant argued that: (a) the charge was defective as monies in a bank account was a 'chose in action' and not tangible property capable of being the subject-matter of an offence under s 37(1) of the MOO; and (b) there was non-compliance with s 173(b) of the Criminal Procedure Code as the magistrate failed to properly explain to her the nature and consequences of her guilty plea, thereby causing a miscarriage of justice. With regard to ground (a), the appellant relied on the High Court's decision in *Harpajan Kaur a/p Delib Singh v Public Prosecutor* [2021] 7 MLJ 678 to contend that monies in a bank account were not physical property which could constitute a 'thing' or 'anything' under s 37(1) of the MOO. With regard to ground (b), the appellant said that when she pleaded guilty to the charge, the magistrate told her that her conviction would carry a mandatory punishment of three months jail and a RM500 fine when, in fact, the magistrate had discretion to decide the punishment.

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Held, setting aside the conviction and sentence and ordering the RM500 fine paid by the appellant to be refunded to her:

(1) The charge on which the appellant was convicted did not constitute an offence under s 37(1) of the MOO. Her guilty plea was therefore invalid and the conviction could not stand. The conviction and sentence were therefore set aside (see paras 25–27).

(2) Section 37(4) of the MOO defined 'possession' as referring to possession of tangible items that were stored or kept in physical locations, such as a house, building, vehicle, ship, vessel, boat or other place, as well as possession in a public road or place (see para 18).

(3) The terms 'house, building, vehicle, ship, vessel, boat' preceding 'other place' and 'public road' preceding 'place' in s 37(4) formed a category or genus of physical locations where tangible items could be stored or concealed. The principle of ejusdem generis (of the same kind) dictated that the general terms 'other place' or 'place' in s 37(4) should be construed to be confined to the same or similar types of physical locations as the preceding terms, ie physical locations where tangible items could be stored or concealed (see paras 19–20).

(4) Monies in a bank account, credited to an account holder, were a 'chose in action', representing a personal right to possess property that could be enforced through legal action rather than through physical possession. Essentially, those funds signified a claim against the bank rather than a tangible asset that one could physically hold (see para 21).

(5) The general term 'other place' or 'place' in s 37(4) of the MOO did not extend to intangible or abstract concepts like monetary claims or credit balances in financial institutions. These concepts lacked the physical characteristics associated with the preceding terms, namely, house, building, vehicle, ship, vessel, boat or public road (see para 22).

(6) Furthermore, ss 37(6)–37(9) of the MOO outlined procedures for searching physical locations and seizing property found therein. These procedures were designed for tangible items that could be physically handled, transported and presented before a magistrate. In contrast, monies in a bank account could not be seized in the same manner. This distinction clearly indicated the legislative intent that s 37(1) was not intended to apply to intangible assets such as funds held in bank accounts (see para 23).

(7) The penalty for the offence under s 37(1) of the MOO was 'imprisonment for three months and a fine of RM500'. This granted the magistrate discretion to impose either a fine or imprisonment or both, based on s 44 of the Interpretation Ordinance 2005 (Sarawak Cap 61). Since the magistrate had discretion to impose both fine and imprisonment, the use of the term 'shall' by the magistrate was not improper. If the magistrate's use of the term 'shall' did not accurately reflect the discretionary nature of his power in imposing punishment for

the offence committed, it was only a mere irregularity which did not invalidate the proceedings (see paras 33–35).

(8) Even if the appellant understood the term 'shall' to mean that both a fine and imprisonment would be imposed upon her, and if she believed that imprisonment was mandatory and was concerned about this, she had ample opportunity to retract her guilty plea, but she chose not to do so. This showed that the magistrate's explanation regarding the nature and consequences of the sentence — specifically whether imprisonment was mandatory due to the use of the term 'shall' — was not a significant concern for the appellant (see paras 36–37).

(9) In any event, the magistrate had only imposed a RM500 fine on the appellant. If the appellant truly understood the magistrate to mean that imprisonment was mandatory, such an outcome never materialised. Given that the appellant was fully aware of her options and had the opportunity to withdraw her guilty plea and was only given a fine, there was no basis for her to claim that she was misled to her prejudice or that a miscarriage or failure of justice had occurred (see paras 38–39).

[Bahasa Malaysia summary

Perayu dijatuhkan hukuman denda sebanyak RM500 jika gagal bayar penjara tujuh hari oleh mahkamah majistret selepas dia mengaku bersalah memiliki sejumlah RM1,200 yang 'diperoleh secara haram' di dalam akaun banknya, yang mana jumlah tersebut tidak dapat dijelaskan olehnya. Pertuduhan terhadap perayu dikenakan menurut s 37(1) Ordinan Kesalahan-Kesalahan Kecil Sarawak 1958 ('OKKKS'). Dalam rayuan ini terhadap sabitan dan hukuman, perayu berhujah bahawa: (a) pertuduhan itu cacat kerana wang dalam akaun bank adalah 'dipilih dalam tindakan' dan bukannya harta berkaitan yang boleh menjadi perkara utama kesalahan di bawah s 37(1) OKKKS; dan (b) terdapat ketidakpatuhan terhadap s 173(b) Kanun Tatacara Jenayah kerana majistret gagal menjelaskan dengan betul kepadanya sifat dan akibat pengakuan bersalahnya, dengan itu menyebabkan ketidakadilan. Berkenaan dengan alasan (a), perayu bergantung kepada keputusan Mahkamah Tinggi dalam kes *Harpajan Kaur a/p Delib Singh v Public Prosecutor* [2021] 7 MLJ 678 dan menghujahkan bahawa wang dalam akaun bank bukanlah harta fizikal yang boleh membentuk 'benda' atau 'sebarang benda' menurut s 37(1) OKKKS. Berkenaan dengan alasan (b), perayu menghujahkan bahawa, apabila dia mengaku bersalah atas pertuduhan itu, majistret memberitahunya bahawa sabitannya akan membawa hukuman mandatori tiga bulan penjara dan denda RM500 sedangkan sebenarnya majistret mempunyai budi bicara untuk memutuskan hukuman itu.

Diputuskan, mengenepikan sabitan dan hukuman dan memerintahkan denda RM500 yang telah dibayar dipulangkan kepada perayu:

(1) Pertuduhan di mana perayu disabitkan tidak membentuk kesalahan di bawah s 37(1) OKKKS. Oleh itu, pengakuan bersalahnya tidak sah dan sabitannya tidak dapat dipertahankan. Oleh itu, sabitan dan hukuman diketepikan (lihat perenggan 25–27).

(2) Seksyen 37(4) OKKKS mendefinisikan 'pemilikan' kepada pemilikan barang ketara yang disimpan di lokasi fizikal, seperti rumah, bangunan, kenderaan, kapal, vesel, bot atau di tempat lain, serta pemilikan di jalan atau tempat awam (lihat perenggan 18).

(3) Istilah 'rumah, bangunan, kenderaan, kapal, vesel, bot' diletakkan sebelum 'tempat lain' dan 'jalan awam' diletakkan sebelum 'tempat' menurut s 37(4) dan terletak di dalam kategori atau genus lokasi fizikal yang mana barang ketara boleh disimpan atau disembunyikan. Prinsip ejusdem generis (dari jenis yang sama) menentukan bahawa istilah umum 'tempat lain' atau 'tempat' menurut s 37(4) harus ditafsirkan terhad kepada jenis lokasi fizikal yang sama atau serupa seperti istilah sebelumnya, iaitu lokasi fizikal di mana barang-barang ketara boleh disimpan atau disembunyikan (lihat perenggan 19–20).

(4) Wang dalam akaun bank yang dikreditkan kepada pemegang akaun, adalah 'dipilih dalam tindakan', mewakili hak peribadi untuk memiliki harta yang boleh dikuatkuasakan melalui tindakan undang-undang dan bukannya melalui pemilikan fizikal. Pada asasnya, wang tersebut menandakan tuntutan terhadap bank dan bukannya aset ketara yang boleh dipegang secara fizikal (lihat perenggan 21).

(5) Istilah umum 'tempat lain' atau 'tempat' menurut s 37(4) OKKKS tidak meliputi konsep tidak ketara atau abstrak seperti tuntutan kewangan atau baki kredit dalam institusi kewangan. Konsep-konsep ini tidak mempunyai ciri-ciri fizikal yang berkaitan dengan istilah sebelumnya, iaitu, rumah, bangunan, kenderaan, kapal, vesel, bot atau jalan awam (lihat perenggan 22).

(6) Tambahan pula, ss 37(6)–37(9) OKKKS menggariskan prosedur untuk mencari lokasi fizikal dan merampas harta yang terdapat di dalamnya. Prosedur ini ditetapkan untuk barang ketara yang boleh dikendalikan, diangkut dan dikemukakan secara fizikal di hadapan majistret. Sebaliknya, wang dalam akaun bank tidak boleh dirampas dengan cara yang sama. Perbezaan ini jelas menunjukkan niat perundangan bahawa s 37(1) tidak dimaksudkan untuk digunakan untuk aset tidak ketara seperti wang yang diletakkan di dalam akaun bank (lihat perenggan 23).

(7) Hukuman bagi kesalahan di bawah s 37(1) OKKKS ialah 'penjara selama tiga bulan dan denda RM500'. Ini memberi budi bicara majistret untuk mengenakan sama ada denda atau penjara atau kedua-duanya, berdasarkan s 44 Ordinan Tafsiran 2005 (Sarawak Cap 61). Oleh kerana majistret mempunyai budi bicara untuk mengenakan denda dan penjara,

penggunaan istilah 'hendaklah' oleh majistret adalah tidak wajar. Sekiranya penggunaan istilah 'hendaklah' oleh majistret tidak mencerminkan dengan tepat sifat budi bicara kuasanya dalam menjatuhkan hukuman bagi kesalahan yang dilakukan, ianya hanyalah ketidakaturan semata-mata yang tidak membatalkan prosiding (lihat perenggan 33–35).

(8) Walaupun perayu memahami istilah 'hendaklah' bermaksud bahawa kedua-dua denda dan penjara akan dikenakan ke atasnya dan sekiranya dia percaya bahawa pemenjaraan adalah wajib dan peka terhadap perkara ini, dia mempunyai peluang yang mencukupi untuk menarik balik pengakuan bersalahnya. Namun, dia memilih untuk tidak berbuat demikian. Hal ini menunjukkan bahawa penjelasan majistret mengenai sifat dan akibat hukuman — khususnya sama ada pemenjaraan adalah wajib kerana penggunaan istilah 'hendaklah' — bukanlah perkara yang serius untuk perayu (lihat perenggan 36–37).

(9) Dalam apa jua keadaan, majistret hanya mengenakan denda RM500 ke atas perayu. Sekiranya perayu benar-benar memahami majistret bermaksud bahawa pemenjaraan adalah wajib, keputusan sedemikian tidak pernah menjadi kenyataan. Memandangkan perayu menyedari sepenuhnya pilihannya dan mempunyai peluang untuk menarik balik pengakuan bersalahnya dan hanya diberikan denda, tiada asas untuk dia mendakwa bahawa dia telah dikelirukan atau terdapat ketidakadilan (lihat perenggan 38–39).]

Cases referred to

Harpajan Kaur a/p Delib Singh v PP [2021] 7 MLJ 678, HC (folld)
Manokaran v PP [1979] 1 MLJ 262 (refd)
Meor Sazali bin Meor Abdullah v PP [2023] MLJU 2278, HC (refd)
Mok Chee Cheong v PP [2022] MLJU 191, HC (refd)
Municipal Commissioner v Chua Seng [1882] 3 Kyshe 149 (refd)
Pendakwa Raya lwn Linges a/l Ragunathan dan lain-lain kes [2024] MLJU 1125, HC (refd)
Pendakwa Raya lwn Mohd Redzwan bin Md Yatim dan lain-lain [2023] MLJU 1538; [2023] 1 LNS 1354, HC (refd)
Pendakwa Raya lwn Ng Wai Kuan dan lain-lain [2023] MLJU 603; [2023] CLJU 553, HC (refd)
Pendakwa Raya lwn Rokiah bt Abdul Kadir dan lain-lain [2024] MLJU 1415; [2024] CLJU 1350, HC (refd)
Powell Appellant; and the Kempton Park Racecourse Company, Limited Respondents [1899] AC 143, HL (refd)
Sures a/l Perumal v PP [2001] 2 MLJ 106, HC (refd)

Legislation referred to

Criminal Procedure Code ss 156, 173(b), 323, 422
Interpretation Ordinance 2005 (Cap 61) s 44
Minor Offence Ordinance 1958 (Cap 56) s 37, 37(1), (4), (6), (7), (8), (9)
Minor Offences Act 1955 s 29(1)

Ranbir Singh Sangha (Ranbir S Sangha & Co Advocates) for the appellants.
Mark Kenneth Netto (Deputy Public Prosecutor, Sarawak State Attorney General's Chambers) for the respondent.

Wong Siong Tung J:

INTRODUCTION

[1] The appellant, Ezreen Nasuha bt Razuli, is appealing against her conviction and sentence imposed by the magistrate court for an offence under s 37(1) of the Minor Offence Ordinance 1958. She pleaded guilty to the offence on 11 December 2023, and was consequently fined RM500, in default, imprisonment of seven days.

[2] The offence with which the appellant was charged is as follows:

> That you on 26th August 2023 at Lot 424 Jalan Sentosa Salim, in the district of Sibu, in the State of Sarawak, was found in possession of RM1200 (Ringgit Malaysia One Thousand and Two Hundred) which is unlawfully obtained in your CIMB personal account bearing the account number 7033133654 and you have failed to an account satisfactorily of how you came by such thing, thereby you had committed an offence under Section 37(1) of Minor Offences Ordinance Sarawak and punishable under the same section.

[3] The grounds of the appellant's appeal can be summarised into two main points as follows:

(a) the charge against the appellant is defective, as it involves monies in a bank account, which are considered a 'chose in action' and not tangible property under s 37(1) of the Minor Offence Ordinance 1958; and

(b) non-compliance with s 173(b) of the Criminal Procedure Code, as the learned magistrate failed to properly explain the nature and consequences of the guilty plea. This misled the appellant into pleading guilty, thereby causing prejudice and resulting in a miscarriage of justice.

DEFECTIVE CHARGE

[4] The offence directed at the RM1,200 found in the appellant's bank account, which was allegedly obtained unlawfully and for which the appellant failed to provide a satisfactory explanation for how the funds got into her account.

[5] Relying on the case as decided in *Harpajan Kaur a/p Delib Singh v Public Prosecutor* [2021] 7 MLJ 678, learned counsel for the appellant submitted that the charge against the appellant is defective and the facts as stated therein are not capable of constituting an offence under s 37(1) of the Minor Offences Ordinance (Sarawak Cap 56) because the monies in the bank account are considered 'chose in action' and not tangible property. It is contended that the monies found in the appellant's bank account does not fall under the definition of 'anything' in s 37(1) of the Minor Offences Ordinance (Sarawak Cap 56).

[6] Learned counsel for the appellant also submitted that the charge did not state that the monies had been withdrawn, meaning the appellant did not have possession of the monies.

[7] The learned DPP on the other hand, submitted that the words 'anything' and 'thing' in s 37(1) of the Minor Offences Ordinance (Sarawak Cap 56) includes both tangible and intangible property such as monies in the bank account rely on the case of *Mok Chee Cheong v Public Prosecutor* [2022] MLJU 191 and the case of *Pendakwa Raya lwn Linges a/l Ragunathan dan lain-lain kes* [2024] MLJU 1125.

[8] All these cases relied on by the learned appellant's counsel and the learned DPP are decided by the High Court upon interpretation of s 29(1) of the Minor Offences Act 1955 which are similarly worded as s 37(1) of the Minor Offences Ordinance (Sarawak Cap 56).

[9] In *Harpajan Kaur a/p Delib Singh v Public Prosecutor* [2021] 7 MLJ 678, the High Court ruled that funds in a bank account are 'chose in action' and not physical property. As the bank acts as a debtor, an account holder does not possess these funds. The court held that possession under s 29(1) of the Minor Offences Act 1955 applies only to tangible, movable property, excluding intangible assets like bank funds. Therefore, such funds do not qualify as 'property' under the Act, rendering any charges based on their possession invalid. It was also decided that such defective charges cannot be cured by application of the s 156 or s 422 of the Criminal Procedure Code.

[10] The ruling in *Harpajan Kaur a/p Delib Singh v Public Prosecutor* was followed by the High Court in *Pendakwa Raya lwn Ng Wai Kuan dan lain-lain*

[2023] MLJU 603; [2023] CLJU 553; *Pendakwa Raya lwn Mohd Redzwan bin Md Yatim dan lain-lain* [2023] MLJU 1538; [2023] 1 LNS 1354 and *Pendakwa Raya lwn Rokiah bt Abdul Kadir dan lain-lain* [2024] MLJU 1415; [2024] CLJU 1350.

[11] In the case of *Mok Chee Cheong v Public Prosecutor* [2022] MLJU 191 relied on by the learned DPP, the High Court in that case did not make a definitive decision on whether monies in a bank account are capable of possession or considered a 'thing' under s 29(1) of the Minor Offences Act 1955 as the issue was pending before the Court of Appeal then.

[12] In *Meor Sazali bin Meor Abdullah v Public Prosecutor* [2023] MLJU 2278, the High Court also did not make a definitive ruling on whether monies in a bank account constitute 'anything' under s 29(1) of the Minor Offences Act 1955 and thus, the question remains unresolved in that case.

[13] In *Pendakwa Raya lwn Linges a/l Ragunathan dan lain-lain kes*, the High Court noted that the DPP has not pursued with the appeal of the ruling in *Harpajan Kaur a/p Delib Singh v Public Prosecutor* to the Court of Appeal. The High Court in that case, however did not follow the ruling in *Harpajan Kaur a/p Delib Singh v Public Prosecutor*.

[14] The High Court in *Pendakwa Raya lwn Linges a/l Ragunathan dan lain-lain kes,* gave a broad interpretation to 'anything' and 'thing' as 'property' under s 29(1) of the Minor Offences Act to include intangible assets like monies in the bank accounts to effectively address modern financial crimes, thereby protecting public interest.

[15] The Minor Offences Ordinance (Sarawak Cap 56) enacted more that 60 years ago, by s 37 provides:

> Other Offences
>
> 37 Fraudulent possession of property
>
> (1) Any person who has in his possession or conveys in any manner *anything* which may be reasonably suspected of being stolen or unlawfully obtained shall, if he fails to account satisfactorily how he came by *such thing*, be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars.
>
> [Amended by Ordinance 16 of 1957]
>
> (2) If any person charged with having or conveying anything stolen or unlawfully obtained declares that he received such thing from some other person, or, that he was employed as carrier, agent or servant *to convey the same for some other person*, the Magistrate may cause all such other persons and, also, if necessary, every informer or pretended purchaser or other person *through whose possession the same has passed* (so

long as that other person is alleged to have had possession of such thing within the jurisdiction of such Magistrate), to be brought before him and examined, and may examine witnesses upon oath touching the same.

(3) If it appears to such Magistrate that any person so brought before him had possession of such thing and had reasonable cause to believe the same to have been stolen or unlawfully obtained, such person shall be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars.

[Amended by Ordinance 16 of 1957]

(4) The word 'possession' in subsections (1), (2) and (3) includes possession *in a house, building, vehicle, ship, vessel, boat or other place, as well as possession in public road or place*.

(5) Any person who —

(a) having been convicted of an offence punishable under this section or under Chapter XII or Chapter XVII of the Penal Code; or

(b) having convicted in any other part of Malaysia or in any other part of the Commonwealth of an offence of a nature similar to any of those offences,

is subsequently convicted of an offence punishable under this section shall be guilty of an offence: Penalty, imprisonment for six months and a fine of one thousand dollars.

[Amended by Ordinance 16 of 1957]

(6) If information is given on oath to a Magistrate that there is cause to suppose that any property which may be reasonably suspected of being stolen or unlawfully obtained is *within any house, building, ship, vessel, boat or other place*, such Magistrate may, by warrant directed to any police officer, *cause such house, building, ship, vessel, boat or other place* to be entered and searched at any hour of day or night.

(7) The information mentioned in subsection (6) shall describe the property which it is reasonably suspected has been stolen or unlawfully obtained, and *shall also describe the house, building, ship, vessel, boat or other place* in which such property is suspected to be.

(8) If, upon the making of the search, any property, such as that described in the information, is *found in the house, building, ship, vessel, boat or other place*, the police officer making the search or some other police officer *shall convey such property before a Magistrate*, or *guard the same on the spot, or otherwise dispose of that property in some place of safety*.

(9) The police officer making the search or some other police officer shall also take into custody and carry before a Magistrate *every person in such house, building, ship, vessel, boat or other place in whose possession or under whose control such property is found*.

(10) The provisions of sections 64, 68 and 69 of the Criminal Procedure Code shall apply to searches made under this section. (Emphasis added).

[16] After reading and considering the reasoning in both *Harpajan Kaur a/p Delib Singh v Public Prosecutor* and *Pendakwa Raya lwn Linges a/l Ragunathan dan lain-lain kes*, along with a careful examination of the provisions under s 37 of the Minor Offences Ordinance (Sarawak Cap 56), this court prefers the reasoning and ruling in *Harpajan Kaur a/p Delib Singh v Public Prosecutor*.

[17] In interpreting s 37 of the Minor Offences Ordinance (Sarawak Cap 56), the terms 'anything' and 'such thing' as used in s 37(1), it is crucial to consider the context of the entire provision, particularly the definition of 'possession' provided by s 37(4) of the Ordinance. In other words, these terms must be interpreted within the legal framework of the ordinance, particularly in relation to how 'possession' is defined in s 37(4) of the Ordinance and in line or harmoniously with other provisions in s 37 of the Ordinance.

[18] Section 37(4) of the Minor Offences Ordinance (Sarawak Cap 56) defines 'possession' as referring to tangible items that are stored or kept in physical locations, such as a house, building, vehicle, ship, vessel, boat, or other place, as well as possession on a public road or in a public place.

[19] The terms 'house, building, vehicle, ship, vessel, boat', preceding 'other place', and 'public road' preceding 'place', in s 37(4) form a category or genus of physical locations where tangible items can be stored or concealed.

[20] The principle of *ejusdem generis* (of the same kind) dictates that the general terms 'other place' or 'place' in s 37(4) should be construed to be confined to the same or similar types of physical locations as the preceding terms, that is physical locations where tangible items can be stored or concealed.

[21] Monies in a bank account, credited to an account holder, are considered a 'chose in action', representing a personal right to possess property that can be enforced through legal action rather than through physical possession. Essentially, these funds signify a claim against the bank rather than a tangible asset that one can physically hold.

[22] The general term 'other place' or 'place' in s 37(4) of the Minor Offences Ordinance (Sarawak Cap 56) do not extend to intangible or abstract concepts like monetary claims or credit balances in financial instruments. These concepts lack the physical characteristics associated with the preceding terms, namely, 'a house, building, vehicle, ship, vessel, boat', or 'public road'.

See: *Powell Appellant; and the Kempton Park Racecourse Company, Limited Respondents* [1899] AC 143.

[23] Furthermore, ss 37(6)–37(9) of the Minor Offences Ordinance (Sarawak Cap 56) outline procedures for searching physical locations and seizing property found therein. These procedures are designed for tangible items that can be physically handled, transported, and presented before a magistrate. In contrast, monies in a bank account cannot be seized in the same manner. This distinction clearly indicates the legislative intent that s 37(1) is not intended to apply to intangible assets, such as funds held in bank accounts.

[24] The court's role is to interpret, ensuring that the intentions of the Legislature are adhered to and apply the law as enacted by the Legislature, not to create or legislate new laws. If there are perceived loopholes or inadequacies in the law, particularly concerning emerging commercial crimes, it is the responsibility of the legislature to address these issues through new legislation or amendments to existing laws.

[25] For these reasons, the charge against the appellant for possessing RM1,200 in her bank account, a chose in action, cannot legally constitute an offence under s 37(1) of the Minor Offences Ordinance (Sarawak Cap 56).

[26] As such, the appellant's guilty plea is invalid, as it pertains to something that is not an offence. Consequently, the conviction based on this guilty plea cannot stand.

See: *Municipal Commissioner v Chua Seng* [1882] 3 Kyshe 149; *Manokaran v Public Prosecutor* [1979] 1 MLJ 262 and *Sures a/l Perumal v Public Prosecutor* [2001] 2 MLJ 106.

[27] Accordingly, this court ought, exercise its revisionary powers to set aside the appellant's conviction and the imposed sentence.

IMPROPER EXPLANATION OF NATURE AND CONSEQUENCES OF THE GUILTY PLEA

[28] In case this court is wrong regarding the defective nature of the charge, this court will also address the grounds related to non-compliance with s 173(b) of the Criminal Procedure Code as part of the appellant's appeal.

[29] After the appellant indicated her guilty plea voluntarily, the learned magistrate proceeded to explain to the appellant, the nature and consequences of her guilty plea as recorded in the notes of proceedings, which are reproduced as follows:

> Q10: Do you understand that pursuant to under section 37 of the Sarawak Minor Offences Ordinance 1958, upon conviction, you *shall* be punished with

imprisonment for three (3) months and a fine of five hundred ringgit (RM500.00).

Accused: Yes. (Emphasis added.)

[30] Learned counsel for the appellant submitted that the magistrate incorrectly explained the nature and consequences of the guilty plea, seemingly by using the word 'shall', which led the appellant to believe that imprisonment was mandatory when, in fact, it was discretionary. It is thus contended that there was non-compliance with s 173(b) of the Criminal Procedure Code.

[31] The DPP submitted that this issue is irrelevant, as the magistrate did not impose any imprisonment sentence, only a fine of RM500.

[32] In essence, the appellant's complaint is that she was not informed that the imprisonment sentence was discretionary.

[33] Under s 37(1) of the Minor Offences Ordinance (Cap 56), the penalty for the offence is stated as 'imprisonment for three months and a fine of five hundred dollars', granting the learned magistrate a discretion to impose either both a fine and imprisonment, or only one of these penalties — either a fine or imprisonment. This is based on the provision under s 44 of the Interpretation Ordinance 2005 (Sarawak Cap 61).

[34] Since the learned magistrate has the discretion to impose a fine together with imprisonment sentence, the use of the term 'shall' by the magistrate is not improper.

[35] If the learned magistrate's use of the term 'shall' did not accurately reflect the discretionary nature of his power in imposing the punishment for the offence committed, it constitutes a mere irregularity. Such an irregularity does not invalidate the proceedings unless it can be shown to have resulted in a failure of justice.

See: s 422 of the Criminal Procedure Code.

[36] Even if the appellant understood the term 'shall' used by the learned magistrate to mean that both a fine and an imprisonment sentence would be imposed upon her for her guilty plea, and if she believed imprisonment sentence was mandatory, and was concerned about this, she had ample opportunity to retract her guilty plea, which she chose not to do.

[37] This demonstrates that the learned magistrate's explanation regarding the nature and consequences of the sentence — specifically whether

imprisonment was mandatory due to the use of the term 'shall' — was not a significant concern for the appellant.

[38] Furthermore, as submitted by the learned DPP, the learned magistrate imposed only a fine of RM500, without any imprisonment sentence. If the appellant had truly understood the learned magistrate to mean that imprisonment was mandatory, this outcome never materialised.

[39] Given that the appellant was fully aware of her options, had the opportunity to withdraw her plea, and was only fined without any imprisonment imposed, there is no reasonable basis for claiming she was misled to her prejudice or that a miscarriage of justice or failure of justice occurred. The appellant's choice to maintain her guilty plea, despite the magistrate's explanation and her opportunity to retract, demonstrates that any alleged misunderstanding did not materially impact her situation.

[40] In summary, the combination of the magistrate's explanation, the appellant's opportunity to withdraw her plea, and the actual sentence imposed collectively demonstrate that the appellant was not misled to her prejudice, and there was no miscarriage of justice or failure of justice.

[41] Hence, if not because of the defective charge, the appellant's guilty plea, along with her conviction and the sentence imposed by the learned magistrate, should be upheld.

CONCLUSION

[42] In light of the finding that the charge is defective and invalid for the reasons stated, this court, exercising its revisionary power under s 323 of the Criminal Procedure Code, hereby sets aside the conviction and sentence imposed upon the appellant by the learned magistrate on 11 December 2023. Additionally, this court orders that the fine of RM500 paid by the appellant be refunded.

Appeal allowed, conviction and sentence set aside and appellant ordered to be refunded RM500 fine.

Reported by Ashok Kumar